Supreme Court of the United States.

OCTOBER TERM, 1903.

No. 87.

MARY SHAPPIRIO AND JACOB I. SHAPPIRIO,
APPELLANTS,

v.

MINNIE D. GOLDBERG AND GEORGE GOLDBERG,
APPELLEES.

BRIEF FOR APPELLEES.

This is a case in which the appellants seek to get something for nothing, and charge the non-commission of a fraud as a fraud against them. Their statement of the case in their brief will be found to be artificial and suppositious in the details vital to this suit. Many matters which are the subjects of sharp conflicts in the testimony are serenely stated as the appellants claim them to be and as if they were conceded by the appellees. In addition, the assignment of errors is entirely too general.

The bill seeks affirmance and rescission of a sale of realty. Inconsistency is not its least novelty. The bill and testimony taken to support it present a unique paradox.

Jacob I. Shappirio sues only as the husband of Mary (R., p. 1). The bill alleges that *she*, through him, agreed to pur-

chase from George Goldberg part of lot 28 *and part of lot 2*, in square 977; that Jacob, acting as *her* agent, was *told* by Goldberg that the entire yard inclosed and the barns then in the use and possession of him, Goldberg, were parts or parcels of the premises included in the sale; that *she* agreed to purchase said property as the same was pointed out and described to her husband, acting as her agent, at the price of $6,000; that Goldberg agreed to sell and convey the same to her for that sum; that Goldberg *stated* that the land described—part of lot 28 *and part of lot 2*, in square 977—all belonged to and was a part of the premises; that there was no outward appearance to show differently; that complainants, having full faith and confidence in Goldberg, *relied upon such representations;* that the entire transaction in relation to transferring the property was left to one Richold, *the agent of Goldberg;* that neither of the complainants was familiar with nor posted upon such matters, and *relied solely upon such representations;* that Goldberg knew at the time that he did not own the record or legal title to any part of said lot 2 (R., p. 2); that, although Goldberg had agreed to sell said pieces or parcels of land and premises to said Mary, he only conveyed to her the part of lot 28; that her deed from Goldberg was not examined by her or Jacob before paying for the property, because, having full faith and confidence in Goldberg, *and relying upon said representations*, they did not deem it necessary to do so; that *Goldberg*, while occupying the property as tenant of Mary, purchased the record or legal title to said part of lot 2 and caused it to be conveyed to his wife Minnie; that he paid $250 for it from *his own means* (R., p. 3); that Minnie has no interest in it but to hold it for him to aid him in carrying out his alleged fraudulent scheme; that he paid for it more than thrice its market value and purchased it only for his alleged fraudulent purpose, and that *Mary* did not intend to purchase only the property conveyed to her, and would not have purchased nor paid for the same except upon

the *supposition* that she was buying the *two* pieces or parcels of land as shown and pointed out to *her husband* (R., p. 4). The prayers are for process, references, accountings, injunction *pendente lite* (R., p. 4), general relief (R., p. 5), for a declaration by the court that Minnie holds said part of lot 2 *for the use* of Mary, and that the former may be required to convey the same to the latter free and clear of any incumbrance placed upon the same; and in case such relief cannot be granted, for rescission of the sale to *Mary*, refund of the entire purchase-money, of all costs and charges, with interest thereon from the date of such payments, together with a reasonable amount for such other *damages* as she has suffered by reason of the sale, for sale of the property by court trustees, and for a deficiency decree against Goldberg (R., p. 4).

The bill, it will be noted, recites an agreement to sell to *Mary*, and false representations made to *her*. The intended double aspect is really specific performance and rescission, two utterly inconsistent remedies. The fraud charged in the bill is actual and active, *not mere silence*. The alleged false representations of Goldberg were "*relied solely upon*" by Mary, so she avers in the bill (R., p. 2). Proof of any actual fraud other than that alleged, or of any constructive fraud whatever, *or of mere silence*, would be neither responsive to nor sufficient under this bill.

This suit was filed on May 18, 1901 (R., p. 1). The date of the agreement for sale is alleged as May 11, 1900 (R., p. 2). The deed to Mary was made by Goldberg on June 5, 1900 (R., pp. 49, 50). The deed to Minnie was made by Darby on September 28, 1900 (R., p. 152).

The defendants answered fully, denying all of the allegations of fraud and the other matters essential to relief (R., pp. 5–11). They say that they *did not know Mary* in connection with the property involved until about the time when they executed their deed to her, on June 5, 1900. Before that time *they knew only Jacob* in the matter of the sale of the

property. *They deny that any part of the property sold or agreed to be sold to Jacob consisted of part of lot* 2. They agreed to sell to him, and sold to him, *only the property described in their said deed of June* 5, 1900, *to Mary.* This deed was prepared *by her own expert agents* after examination by them of the title and plat of Goldberg's property, which consisted only of the south 34 feet front of lot 28, in square 977. The complainants were well aware on June 5, 1900, that Goldberg did not own any part of lot 2 (R., p. 6). The description given in the deed to Mary shows a piece of land of a shape and of dimensions so utterly inconsistent with the property as described and claimed by the complainants in their bill that it is impossible that they could have honestly thought or believed that any part of lot 2 was either included or intended to be included in the land which Goldberg agreed to sell or sold. One who runs may read (R., pp. 6, 7). Every allegation of fraud or false representation made in the bill is unequivocally met and fully denied by the answer. Richold was also Shappirio's agent in the sale. There was only one stable or shed on lot 28. Goldberg never told Jacob that the premises included two stables, but did tell him, *through his agent, Richold,* that he did not own the stable on lot 2, nor the land on which it stood, and that the agreement of sale did not and could not include any part of lot 2. Shappirio did not purchase in reliance upon any representations of Goldberg, but had the title and plat fully examined and the deed prepared by experts employed by him (R., p. 7). Complainants' failure to read their deed is immaterial. Their own agents prepared it and supervised its execution; likewise a deed of trust from them. They are chargeable with the knowledge of their agents. They could read, and were not prevented from reading the deeds. Goldberg did not buy part of lot 2, but Minnie did, from her own separate money, earned by her before she married Goldberg. She paid 50 cents per square foot for it. Goldberg has no interest in it (R., p. 8). Shappirio offered to resell to Goldberg the property con-

veyed to Mary, *at an advance*, but the offer was declined. Respondents occupied the premises covered by the deed of June 5, 1900, to Mary, as tenants for nearly one year after the sale, paying $50 per month rent. They moved out only because Shappirio refused to reduce the rent. Minnie, and not Goldberg, put the fence around the part of lot 2 which she had bought from Darby. This fence does not prevent the use of the kitchen of No. 1247. It cuts off lot 2 from lot 28. Shappirio never had title or possession of lot 2. Goldberg did not erect the stable on lot 2, but a former owner of that lot did. Minnie does not hold said part of lot 2 for Goldberg, nor for any purpose of his (R., p. 9). Goldberg never pointed out to Jacob any part of lot 2 as constituting a part of the premises agreed to be sold, but, on the contrary, Goldberg distinctly told Jacob, *through his agent, Richold*, when the agreement for sale was made, that said part of lot 2, with the stable or shed in the rear of No. 1247, did not belong to him, Goldberg, and was not to be included in the agreement. The complainants have no right whatever to said part of lot 2. It belongs solely to Minnie as her separate estate. The defendants had been in possession of the shed on lot 2 for several years, under an agreement with the owner thereof. They used it for storage purposes. In the fall of 1900 they heard that lot 2—the front part—was to be sold. In order to retain the rear part and shed, Minnie concluded to buy it, and did so. Her purchase had nothing whatever to do with Mary Shappirio or her property. Minnie had nothing whatever to do with the transaction between Goldberg and Shappirio, except to sign the necessary papers solely as Goldberg's wife. When the agreement for sale was made, lot 28 was subject to a deed of trust, made some years before by Goldberg, to secure a certain obligation, on which about $3,425.99 was then unpaid. This amount was paid from the Shappirio purchase-money, and the trust was released on June 5, 1900, to Smith and Norment, as trustees, under a new deed of

trust of the property, of June 5, 1900, from the complainants to them. It is now impossible to replace the parties in *statu quo*. The prayers C and D of the bill are utterly inconsistent with each other, and prayer D is inconsistent in itself, and, in the greater part, beyond the power and jurisdiction of a court of equity (R., p. 10). The deed of trust of June 5, 1900, from the complainants to Smith and Norment (R., 218), conveyed only the identical part of lot 28 described in and conveyed by Goldberg's deed to Mary of the same date, and it secured a loan of $4,500 for three years at 5 per cent., then made by Mrs. Clark to complainants (R., p. 11). Manifestly the part of lot 28 conveyed by Goldberg to Mary was taken and accepted in the open money market as good security for a cash loan of $4,500, for a considerable length of time and at a low rate of interest. One would therefore infer, in this city, that the property was worth considerably more than $6,000—the sum for which Goldberg sold to Shappirio.

There is no charge in the bill that Minnie made any false or fraudulent representations to Jacob or Mary in regard to the sale. She had nothing whatever to do with that sale, except only as Goldberg's wife. She did not buy the part of lot 2 until nearly three months after that sale had been entirely closed. How the complainants can reach her part of lot 2, under the pleadings and proofs, I am wholly at a loss to perceive; and how they can have rescission in this case one cannot possibly conceive without first utterly forgetting all of the germane principles of equity power, pleading, practice, and evidence. Even an offer to restore the property to Goldberg, as a predicate of rescission, is wholly omitted. Indeed, the bill seems to negative any intent or willingness to restore. There is no allegation of the respondents' insolvency. The facts alleged, coupled with the startling prayer D, make a case for a court of law, if for any court at all.

Of the evidence, it may be premised that the greater part

of that offered by complainants was totally irrelevant, while the cross-examination of the respondents' witnesses evidenced only a prodigious desire to learn how much they knew about matters wholly foreign to this case. The cross-examination of the respondents—the details of which you are spared by a digest thereof (R., pp. 201–224)—was a masterpiece of irrelevancy and foreign phantom-chasing. The complainants' case closed reminds one of the Comprachicos or Cheylas, and of Racine's saying, "*Et que meconnaitrait l'œil méme de son père*"—in bad French.

Of the plats filed with the bill (R., p. 4) and answer (R., p. 10), it may be said that they clearly show the *dis*connection between lots 2 and 28. The same may also be said of the other plats in the record (R., pp. 51, 153), and also of the plat annexed to the certificate of title issued by the Real Estate Title Insurance Co. to Shappirio in closing the sale of Goldberg to Shappirio, and the Shappirio deed of trust to Smith and Norment.

MOTION TO DISMISS.

1. This appeal should be dismissed for want of jurisdiction, because the amount in controversy is only $1,500.

The entire value of the property is only $6,000 (R., pp. 2, 7, 12, 48, etc.). It is subject to appellants' deed of trust for $4,500 (R., p. 10). This is conceded by appellants (R., pp. 11, 12). The beneficiary and trustees under this deed of trust are not parties to this suit, and their $4,500 interest is not part of the sum in controversy between those who are parties. The appellants' collateral liability on their deed of trust cannot be considered. The actual value of the thing in controversy or the actual amount in dispute is, therefore, only $1,500, for this is the full extent of the appellants' interest in the property.

2. This appeal should be dismissed for want of necessary parties.

This objection was manifestly reserved in paragraph 12 (R., p. 10) of appellees' answer to the bill. The stipulation (R., pp. 11, 12) cannot operate to render rescission possible without having before the court the other parties to the former and present deeds of trust. Apart from the question of jurisdiction, the appellees stand fully by the stipulation.

ON THE MERITS.

The appellees rest upon two main contentions, which are as follows:

1. Upon complainants' own showing, by the pleadings and testimony, they have not made out any case for relief, *as a matter of law.*

2. Upon the whole record, complainants have not made out any case for relief, *as a matter of fact.*

Under these two heads I shall discuss the case as the record presents it to my mind.

Mary Shappirio had nothing whatever to do with the purchase from Goldberg, and knew nothing whatever about it, except what her husband, Jacob, told her. She did not examine any of the papers in relation to it. She was in the Real Estate Title Insurance Company office when she signed the deed of trust. Jacob told her that he would buy the property *for her* for the protection of herself and children (R., p. 13).

The conclusions from this testimony are that *she* did not agree to purchase from Goldberg premises numbers 1245 and 1247 Eleventh street southeast; that Jacob was *not* her agent; that *she* was told nothing by Goldberg, either personally or through her husband, as her agent; that nothing was pointed out by Goldberg to her, either personally or through her husband as her agent; that she did not rely

solely or at all upon any representations made by Goldberg, and that Goldberg did not agree to sell the land to her. Her testimony shows a state of facts directly antagonistic to the sworn allegations of the bill, especially those of paragraphs 3–6 and 11 thereof (R., pp. 2, 3, 4). It is very clear that she was a stranger to Goldberg in the sale—a mere assignee of her husband's own purchase. Jacob, not Mary, contracted with Goldberg. He contracted on his own, not her, account. Neither Goldberg nor his wife knew Mary Shappirio in the sale until they closed it on June 5, 1900 (R., pp. 6, 202, 214). They merely made their deed as Jacob desired. Surely, nothing can be found in the record to show that Goldberg either said or did, or omitted to say or do, anything with the knowledge, information, belief, intention, or suspicion on his part that it was to be communicated to a third party—Mary Shappirio—and acted or relied upon by her. When the authority of Goldberg to Richold to sell, of May 11, 1900, was signed (R., p. 48), Richold informed Goldberg that *Jacob* I. Shappirio was the purchaser (R., p. 60). The deposit receipt of May 11, 1900, given by Richold (R., p. 12), specifically recites *Jacob* I. Shappirio as the purchaser, and is signed by "*Jacob I. Shappirio, purchaser.*"

It follows that Mary Shappirio cannot claim relief upon any alleged false and fraudulent representations not made directly or indirectly to her, nor intended for her eye or intellect. She is the principal complainant; Jacob sues only as her husband (R., p. 1). Indeed, he is both an unnecessary and improper party to the bill. It is only the usual case of a husband buying property and having it deeded to his wife as a gift—or otherwise. Jacob was not her agent in any such sense that she can avail herself, by way of rescission, of any alleged false representations made by Goldberg to Jacob; nor can she claim relief by way of specific performance of the contract between Goldberg and Jacob (R., p. 12), to which she was not a party. Being a

stranger both to the alleged false representations and the contract, they can avail her nothing. So far as this case is concerned, it seems clear from the evidence that Goldberg was the vendor and Jacob the vendee. But Jacob does not sue for the relief prayed. Mary alone claims such relief.

"It is settled law that a fraud on one person is no ground for redress or relief on behalf of a stranger to the transaction. * * * It is a general rule that a person cannot complain of false representations, either for the purpose of maintaining an action for deceit, *or for the purpose of avoiding a contract*, unless the representations were made either directly to him, with the intention that they should be acted upon by him, or, if made to some other person, unless they were made *with the intention that they should be communicated to him, and acted upon by him.*"

14 A. & E. Ency. Law, sec. ed., 148.

Of course, false representations made to an agent may be availed of by the principal. Here the bill charges that the alleged false representations were made to Jacob, the husband, as agent for Mary, but the proof wholly negatives such relation of principal and agent between her and him. It establishes only the relation of donor and donee. As regards Goldberg, Mary stands in the same position as if the deed had run to Jacob and he had thereafter conveyed to his wife Mary.

It seems clear, from the evidence, that until the paper of May 11, 1900, was signed (R., p. 48), Richold was only Jacob's agent, and not Goldberg's. Richold says that on May 11, 1900, he offered Goldberg $6,000 for the property in behalf of Jacob, and Goldberg accepted it (R., pp. 13, 14). Jacob was the only customer. He and Richold together *looked at the property* before May 11, 1900 (R., p. 14). Richold alone attended to the closing of the sale for Shappirio (R., p. 15). That Richold was Shappirio's agent is also clearly shown by the former's cross-examination (R., pp. 60–72). About one month or six weeks before Richold mentioned the Goldberg

property to Shappirio, the latter met Richold and told him to let him (Shappirio) know of any good investment which he (Richold) "ever came across" (R., p. 74). Jacob further testified as follows: "I told him (Richold) to look out and see if he saw anything that was a good investment. * * * He (Richold) *afterwards* came around and told me that Mr. Goldberg would sell, but would not trade" (R., p. 74). There is a great deal more testimony in the record tending to show that Richold was Shappirio's sole agent before May 11, 1900; between that date and June 5, 1900, when the sale was closed; and after the sale, at least until May, 1901, when Goldberg moved out of the premises.

The paper of May 11, 1900, describes the property as "No. 1245 and 1247 11th St., S. E. * * * square 977, *part of lot 28;* 34 feet front by 80, to alley, with improvements" (R., p. 48). It is wholly silent as to *part of lot 2.* Lot 28—Goldberg's part—*did* front 34 feet, and part of it *did* run back 80 feet, and 8 inches more, to an alley (R., p. 10).

Richold further testified: *Before May 11, 1900, Mr. Shappirio had looked at the property with me* on a Sunday morning. We went upstairs *and all around* in both houses and looked at all the rooms, and then we went out in the yard, and I left Shappirio and Goldberg talking together and looking over the property in the yard of 1247. *Goldberg did not state to me at any time that the stable in the rear of 1247 belonged to the property.* I only asked him what was the size of the lot in the front and rear, with the improvements thereon. I *thought* he sold the whole business. *That was my idea.* I *thought* it was all in there what was there. *Jacob* paid the money for the property. *I* fixed it up in Ashford's office. *Jacob* paid $100 deposit before the deeds were made. After the deposit was made Jacob *authorized me to order the deed and attend to the whole business, and I did so.* I ordered the examination of the title and attended to the whole business. After that I collected rents from Goldberg for the property for about a year he was in it. After

five or six months after the sale I learned that the ground upon which the stable of 1247 stood and the back yard to that house were not included in the sale. Goldberg told me that ground did not belong to Shappirio; that we could *look at our deed* (R., pp. *14, 15*). Shappirio had nobody on earth as his agent but myself in the matter. He authorized me to offer Goldberg $6,000. Shappirio had nobody but me as his agent. Nobody knew anything about it but me. I gave it to the title company to examine the title and attend to the whole business right after Shappirio gave me the deposit. Shappirio left it all to me. He did not bother about it at all (R., pp. 60, 61).

Particular attention is invited to the cross-examination of Richold—the complainants' star witness—and to the manifest conclusions therefrom (R., pp. 60–72).

Jacob I. Shappirio, the complainants' most important witness next to Richold, testified, over a fatal objection to his competency, as follows: I told Richold to offer Goldberg $6,000 for the property. I examined the property with Galloway. I had seen it before with Richold. *Goldberg did not say to me that this piece of property on which the stable of 1247 is located was all a part of this property. He never said anything of the kind.* I had no reason to ask him. I left the examination of the papers or title to the property to Richold because I was occupied in business and did not have the proper time to attend to it, and I thought I had better give it to a man who is more able to attend to it than I was, *and I depended solely on Richold.* I knew Goldberg for several years. I did not have any reason to believe that he would defraud me in any way or tell me an untruth (R., pp. 16, 17). *I relied on Richold* because he knew how to attend to it. I gave him the control of it. *I first learned that the ground in the rear of 1247 was not included in the sale about the last part of September or the first part of October, 1900.* Richold did not come near me for a couple of months after he found out that that piece of

ground, as Goldberg stated, did not belong to me, and it was not included in the sale. *Some time in October, 1900, Richold told me that Goldberg said the rear ground and the stable of 1247 were not in the sale.* I told Richold to tell Goldberg that I did not buy the property to lose anything on it. *I bought it to make,* and if, at any time, he wants me to sell, *and will pay me a profit,* I will sell it to him (R., pp. 18, 19). Another time I sent Goldberg the same answer by Richold, when Goldberg sent Curran to Richold to ask whether I would sell the property. Goldberg vacated the premises about May 6, 1901—eleven months after the sale was closed and one year after the contract was made. *I have since tried to rent the property and gave it to an agent. As soon as I heard that the rear ground was not in my deed and did not belong to me, I went to find out whether it belonged to me or not. I went over to the District building about it, and, in fact, I asked somebody to inquire for me.* I did not have the time to do it. Before Goldberg moved he asked me personally to reduce the rent. I refused (R., pp. 19, 20). I am a merchant tailor on Eleventh street N. W., and have a place where I sell general merchandise at 905 D street N. W. I have been in business on my own account since 1889. I own 412 Spruce street. I bought it in May, 1899. I examined Goldberg's property with Richold on a Sunday before the sale. *I had previously told Richold to let me know of any good investments.* That was about a month or six weeks before. In 1884 *I worked* for Cohen, who then kept store *in 1247.* I worked as his salesman for several months, *and lived in the house* (R., pp. 73, 74). 1245 was then a garden lot. There was a back window in 1247. I cannot tell whether there then was a yard, stable, or bank of dirt in the rear of 1247 (R., p. 75). Possibly *Goldberg did not say whether the stable did or did not belong to him. He might as well have said it* (R., pp. 79, 80). Goldberg told Ike to "show him (Shappirio) through *the stable.*" I took it, from what Goldberg *said to Ike,*

that the stable in the rear of 1247 was a part of the property. Goldberg never said one word out of the way about the ownership of that stable. I never made any specific inquiry whether it did or did not belong to him. I would not think a man would offer to sell me anything that did not belong to him. (Part of lot 2 did not belong to Goldberg.) Goldberg did not point out anything in particular. He did not specify any particular part (R., p. 80). I did not ask Goldberg whether the stable in the rear of 1247 belonged to him or not. I did not ask him anything. I did not think a man would sell me what did not belong to him. Richold had the title examined *to find if Goldberg owned the lot.* The deed to my wife was drawn by the title company. I paid the title company. I got Richold to attend to this matter for me (R., pp. 81, 82). *I depended solely on Richold.* I wanted him to look out for my interest. It was simply a matter of confidence. That is why I got Richold. Goldberg never spoke to me in regard to the dimensions of the lot or anything of that kind. I learned the dimensions from the contract—34 by 80. I cannot tell whether the certificate of title was delivered to *me with the deed* or whether the mortgagee has it (R., p. 83). For my part, it could have been drawn up by anybody. *Of course, before Goldberg moved I heard that the rear ground did not belong to me. I heard of it about the first of October, 1900. I then inquired. I consulted Bigelow & Bigelow, lawyers, to investigate it. They investigated it for me* and found out that Goldberg bought that lot in his wife's name (R., pp. 84, 85). Richold did not tell me in October, 1900, that the stable did not belong to me until after I spoke to him. It must have been two or three months after Goldberg told him that he told me. He was afraid to come around. He kept away. He told me that strip of ground was not included in the sale. It must have been late in November or early in December that he told me that. It might have been October (R., p. 85). When I went to the District build-

ing to investigate whether this strip of ground belonged to me or Goldberg, I learned (*in October, 1900*) that part of lot 28 was only one lot, and ran 62 feet and 8 inches, according to the plat. That is what they told me (R., p. 86). (The lot has a depth of 80 feet and 8 inches on the north line and 62 feet and 8 inches on the south line, with a frontage of 34 feet, running back in part to a 30-foot alley. See plat, R., p. 10.) *I went there in one of the fall months.* I thought maybe Goldberg bought this strip for me. *Goldberg said the ground did not belong to me and was not included in the sale.* After the sale Goldberg never stated to me (personally) whether the rear strip did or did not belong to me. I went down and saw him while he was my tenant. I might have seen him two or three times, but I never spoke to him in regard to the situation or anything else, and he never informed me of anything. *I never had any talk with him about the ownership of the stable.* After I saw the fence there I did not see him, but a lawyer. After Goldberg moved out *I bought some shelving from him in the stores.* This was a week or ten days before he moved out (R., p. 87.) I did not then say anything to him about what I had heard about the rear ground, and he did not say anything to me about it. I would have purchased this property merely upon the representations of Goldberg and Richold without having had the plat and title examined and certified, because I knew Goldberg for many years to be a perfectly honest man. (But Shappirio was quite careful to employ and rely upon the title company *and not on Goldberg.*) *I have lately* (September 4, 1901) *tried to rent these houses* (R., p. 88).

I also invite attention to the entire testimony of Richold and Jacob Shappirio (R., pp. 13–16, 16–21, 59–72, 72–89, etc.), the complainants' principal witnesses, for the purpose of drawing attention to the utter failure to prove the allegations of the bill or such a condition of facts as would justify any relief in equity.

The following also appears in Richold's testimony:

When the paper of May 11, 1900, was signed I had an offer from Shappirio of $6,000 for the property, and so told Goldberg. On the same day, *in behalf of Shappirio*, I offered Goldberg this sum, and he accepted it. *Shappirio had nobody on earth as his agent in the matter but myself.* He certainly authorized me to offer Goldberg $6,000. Shappirio had nobody but me as his agent in the matter. Nobody knew anything about it but me. I gave it to the title company to examine the title and attend to the whole business right after Shappirio gave me the deposit. *Shappirio left it all to me. He did not bother with it at all. I* drew up the paper of May 11, 1900, on Goldberg's counter. He told me the number of *the lot* and square. He said *the lot* was 34 by 80, with the improvements. I have never since inquired what the correct dimensions were. I took it to Ashford to examine, and there we closed it up. I *thought* Goldberg sold me 34 by 80, with the improvements. I have been in the real-estate business 12 or 14 years, and have had a great many transactions in buying and selling real estate in this District. I did not look at the plat books in this case. I never looked at the plat of this property at all and have not since this suit was filed. I never knew the yard was not included until *six months after* the sale. (Herein he contradicts Shappirio.) I never investigated it. I thought *Goldberg an honest man and think so to this day* (September 4, 1901). I have always known him to be so as long as I have known him—thirty or thirty-five years. I call him an *honest man and certainly do think he is an honest man. If* there was a trick in this matter I did not know it. I certainly decline to explain what I mean by trick. About *six months* after the sale I found out that the ground in the rear of 1247 was not included in the sale. I gave Shappirio a receipt for the $100 deposit. (See this receipt, R., p. 12.) I did not turn over the deposit to Goldberg. *Shappirio authorized me* to attend to the examination of the title and the closing up of the transaction.

He left it all to me. He did nothing. I certainly attended to it all. I made the loan (the $4,500 Shappirio loan secured by deed of trust to Smith and Norment), and fixed it up, and gave Ashford the instructions. I gave the order to the title company to examine the title. Shappirio told me to do it, and go ahead and *represent him.* I took him down and introduced him to Norment. I did not bother with lawyers. I gave the order to examine the title in my own name. (This order was dated May 28, 1900, directed to the Real Estate Title Ins. Co.; authorized that company to prepare a certificate for 34 feet front of *lot 28*, in square 977, and stated that this property was owned by Goldberg (R., p. 64). (See also R., pp. 208, 201, 218.) It bears my signature. (*It is silent as to part of lot 2.*) I attended to the whole business. Goldberg gave me the property as 34 by 80 to a 30-foot alley. (See plat, R., p. 10. Lines are 34 by 80.8 on north part to a 30-foot alley.) It was subject to a mortgage of $3,500. I *simply took it for granted* that Goldberg sold to Shappirio *other property* than the 34 feet front of lot 28 in square 977. I certainly so understood him. (The contract (R., p. 12) and authority to sell (R., p. 48) contradict this.) I *simply took it for granted* that the stable back of 1247 was included. I *thought* the whole thing ran back. I *simply took it for granted* that the stable back of 1247 was a part of lot 28. I did not look into it any further. I will certainly take your word—what you tell me—in buying property. In buying property I take a man's word a great deal as to its dimensions and title—his mere say-so—and *not* upon an examination of the plat and title. I would take it all my life; anybody would. I would take it without any examination of the plat. (A remarkable real-estate agent!) Who shall I employ but the title company to examine the title? *I have to have somebody.* (Surely, Goldberg's alleged representations were not relied upon!) I could not examine it. *The sale would not have gone through without an examination of the title.* I don't sell property *unless the title is examined*

and is good. I *always* get an examiner to run down the title. They put the *tax certificate* in it. I never look at the plat or title, nor do I employ people to do it. I always have it examined. (What a witness!) There might be a tax title. I collected rent of this property since Goldberg was in it. *I acted solely as Shappirio's agent.* He gave me the renting. Goldberg always paid the rent. About *five* or six months afterwards I first learned that the property in the rear of 1247 did not belong to Goldberg and had not been conveyed to Shappirio. *I did not do anything then.* I did not tell Shappirio. Goldberg always paid the rent in the store. After I learned about the rear ground I collected the rents from Goldberg until he moved out (about May 6, 1901). During all that time I never said a word about it to Shappirio or Goldberg. Goldberg treated me like a gentleman. I *decline to answer whether I was a licensed real-estate broker at the time of this transaction. Shappirio came to me* and told me that the rear strip did not belong to Goldberg. I did not tell Shappirio. *He came to me.* I *took it for granted* that 1245 and 1247, 34 by 80, included the whole property. *I never asked Goldberg* about the house or *stable or yard.* I *took it for granted* that all that belonged to the whole business belonged to what I sold to *my* client. In this case I *took it for granted* that the 34 by 80 meant a rectangular piece of ground, and included *everything* in the rear. *I never asked Goldberg about the stable* or the front house or anything else. Everything that belongs to the property *I took it* (for granted). *Goldberg did not say anything about the stable.* I never examined the ground, 34 by 80, and don't know whether it runs to an alley or anything about it. I don't ask whether this or that belongs to it. You sell me *all you have* and that is the end of it. Goldberg said he would sell *me* 34 by 80, with the improvements up to the alley. I did not write the rest of the order to examine the title—only my signature. I *don't remember* who gave the title company the information as to the lot

and square and name of the owner and frontage of the lot that appears on that order. *I certainly did give it to the company* (R., pp. 60–72).

Darby testified that he would not have sold the *part of lot 2* for less than $300; that he would have asked more than $300 for it; that this ground was never offered for sale; that it was considered *peculiarly valuable* because it was the back of the lot and a *key* to the whole, or necessary to belong to the property (R., pp. 21, 22, 54–56).

Nalley testified that Gates sold *the privilege* of the strip of ground in the rear of 1247 to Goldberg; that he does not know who paid for the stable; that Selby built it on top of a fence already around the strip; that he (Nalley) learned about 6 or 8 months after August, 1894, that the stable and lot in the rear of 1247 did not belong to Goldberg; that he never talked with Goldberg about the ownership of the stable and that piece of ground; that Gates told him (Nalley) that that little piece of ground did not belong to 1247, but was a part of lot 2; that Gates did not say that Goldberg owned it, but said that he sold Goldberg the privilege of it—the right he (Gates) had in it. (Gates' right was mere possession, of a few years' standing, without any title or right of possession whatever—R., pp. 22–24, 56–59.)

Galloway testified: I am familiar with the property. I have been there several times; I did all of Shappirio's work. The *first* time I went down *with Shappirio* to look at the property, *and to see what repairs were to be made.* If I had any work to do there, I wanted to know what I had to do. Goldberg's *brother-in-law* (Ike Roginski) *practically* told Shappirio that the stables belonged to the property. *I have made some repairs there since Goldberg vacated* (about May 6, 1901). I have worked for Shappirio for about three years. I have made repairs and done remodeling for him in various houses and stores. I am now doing about $2,000 worth of remodeling for him. "I * * * remodeled the house on 11th street southeast * * * " (R., 89). I have

done all of his work since I have known him. I did all of the work of tinning, painting, and plastering, and all kinds of work that goes into a building—heating and everything of that kind. I have done nearly $4,000 worth of work for him in the last 12 or 13 months (date of this deposition, September 4, 1901). The areaway and passageway are brick, and not concrete. (They are concrete, and not brick, in fact.) The shutters on the window in the back wall of 1247 cannot be closed *on account of the iron bars. The day Shappirio and I went down to these premises* he told me to look at it *and any part that was necessary to repair to do it.* I looked it over, and told him what I thought was necessary. I went down twice. I went once last year (1900), *but most of the repairs I made six weeks ago* (date of deposition, September 4, 1901). Last year I fixed all of the roofs and chimneys. *This year* (1901) *I overhauled it thoroughly.* I cannot tell the exact time I *first* went down with Shappirio. To the best of my recollection, *it was somewhere about August. It was very warm weather.* At that time I was told (by Shappirio) to make what repairs I thought were then necessary. Jake (Shappirio) said he would not then do anything else unless he got a new tenancy, *which he did this* (1901) *season, painting the place and plastering and everything that was needed.* I made the necessary repairs last year (1900). *About 8 weeks ago* (date of deposition, September 4, 1901) I sent a man down there to do *the other repairs in the way of papering and things of that kind.* When it was occupied I did only extraordinary repairs, *but this* (1901) *season I went through it all inside.* I found the fence *when I went to make the repairs*—that is, when looking at the property *before making the repairs* earlier in the season (1901, *after* Goldberg had moved out about May 6, 1901). When I *first* went with Shappirio to look at the property Jake (Shappirio) asked me to go down there. That is the *first* time I saw it; *after* that time I met Goldberg and Ike Roginski. *I did not hear Goldberg tae anything about whether the stable and property in the rear*

of 1247 did or did not belong to him. He simply said to Ike to show the property. That is all I heard from him. *I don't remember anything positive about it* (R., pp. 26–30, 89–95).

Gates' testimony (R., pp. 30–35) deals with the title, possession, condition, etc., of part of lot 2, but does not touch upon the alleged false representations of Goldberg, which are set up as the *sole* ground for relief by the bill. Gates' evidence is not material to *the* issue. In so far as it is at all relevant, it supports the allegations of the respondents' answer instead of those of the bill. His testimony certainly shows that *when Shappirio worked for Cohen and lived in 1247 he (Shappirio) must have known that the rear ground did not belong to that building or to Goldberg.* His testimony is: I know 1245 and 1247 and lot 2, in square 977. When the alley back of 1247 was cut down a lump of dirt was left there. Afterwards Campbell cut this lump away. My father had possession of all of lot 2, and told me he fenced in this piece after this lump was cut away, and that Goldberg gave him $30 for his right to this piece of the lot. This lump was cut away 7 or 8 years ago. This piece was fenced in the eighties. My father bought lot 2 in 1885 or 1886. He took possession a couple of years afterwards and built a house there. That bank was cut down 6 or 7 years after that. He took possession right after that bank was cut down. When Goldberg built, that bank was there. Goldberg built 4 or 5 years after my father bought lot 2. I don't know who built the stable on the back part of lot 2 (R., pp. 30, 31). My father erected the fence around it and made it a part of the yard of lot 2. He turned over possession of it to Goldberg 3 or 4 years after he owned it. He told me he had sold possession of it to Goldberg for $30. I only know what my father told me. I do not know who built the shed or stable on this ground. I never heard my father or Goldberg speak of that stable. It is very ordinary, a frame building 10 or 12 feet high, looks like a woodshed, and is rickety, too.

My father sold all of lot 2 to Lewis Goldberg, a brother of George Goldberg. I never knew nor heard of Darby owning part of lot 2—never heard of him in connection with it. I never had any talk with Goldberg about this back strip of lot 2. I do not know whether he ever claimed to own it. I don't know anything about Goldberg having sold it (R., pp. 31–35).

Simmons' (B. S.) deposition is only formal, and needs no comment (R., pp. 25, 26).

Simmonds' testimony has been omitted in printing by the appellants.

Kerns' evidence has also been omitted by appellants in printing.

Donohoe's deposition is not only irrelevant, but somewhat foolish in his cross-examination. That the rear strip is a valuable *key* is not denied (R., pp. 36–43).

Aukam's testimony is subject to the same remarks as Donohoe's (R., pp. 43–48).

Simmons' evidence (R., p. 43) is merely formal.

Brady's deposition has been omitted by the appellants in printing.

The foregoing disposes of all of the complainants' oral evidence-in-chief. Of their documentary evidence, the following matters will be noted:

Their plat (R., p. 4) gives no lot numbers, lines, or dimensions; nor does it show the actual, complete *dis*connection between lots 28 and 2, in square 977—a vital matter in this case. It is a mere fanciful sketch, made to order to fit the bill. It certainly fits nothing else—least of all the *actual* facts.

The receipt (R., p. 12) fully supports the respondents' answer. It was called for by them. It is *silent as to lot 2*, but expressly shows Jacob I. Shappirio—*not Mary*—as the purchaser. It bears his signature, but not Goldberg's. "Seller and his agents assume no responsibility for cost of abstract, nor for any damage by reason of said title proving defect-

ive." Thirty (30) days from its date—May 11, 1900—allowed Jacob to close, Goldberg to give a *special* warranty deed; conveyancing at cost of purchaser. *Wherein has Goldberg failed to comply with this contract?*

The Nalley receipts from Goldberg for rent cast no light upon the issues in the case (R., pp. 48, 49, 22, 23).

The application for the permit to construct the shed in the rear of 1247 (R., p. 35) is produced to show that Goldberg built it, because this application bears his signature. The cost of the proposed structure was only $25. Goldberg's signature and his connection with the application and the construction of the shed are fully explained in his deposition in the record. The permit (R., pp. 35, 36) was produced—rather a copy of it—in the same connection and for the same purpose as the application. The word "owner" was in print (R., p. 54).

The authority to Richold (R., p. 48) supports the respondents' answer. *It is silent as to lot 2.*

The deed to the complainant Mary Shappirio from the respondents (R., pp. 49, 50) fully supports their answer. It flatly contradicts the lines given in the bill as the true lines. This deed agrees with the prior writings—the authority to sell (R., p. 48), the receipt (R., p. 12), and the order to examine the title (R., p. 64), as to the true description of the property agreed to be sold. The description in the Shappirio deed of trust to Smith and Norment was the same as that in the deed in fee (R., p. 11), and Jacob I. Shappirio says that he read the deed of trust. "*I examined the trust*, because I had to sign my name to be liable for the indebtedness on it. *I read it over*" (R., p. 19).

It is true that he also says (R., p. 19) that he only read the description of the debt; but of what effect is this fact, even if it be true? Does not the description of the *land* agree *literally* with the agreement to sell, and the other prior writings? Does it not describe and convey part of lot 28, in square 977? Does it not describe and convey 34

feet front by 80 feet and 8 inches to an alley? Why should it have gone beyond all the former writings and have included wholly different property—*part of lot 2?* How could it have included part of lot 2 when, admittedly, neither Goldberg nor his wife, Minnie, then owned it? Does not the fraud charged in this case really consist of an omission to commit a fraud? Are not the respondents really charged only with fraud in *omission* to commit fraud, and not in *commission* of fraud? And does not the *alleged commission* really consist of the *actual omission* to commit a fraud?

The plat (R., p. 51) does not give the length of the north line of lot 28; and it gives the frontage as 32 instead of 34 feet. The alley line should be 14 feet instead of 12, as given.

The chains of title (R., pp. 51–54) give a partial history of lots 28 and 2, in square 977. They certainly show that part of lot 2 was not and could not have been contemplated nor included in the sale to Shappirio.

On January 17, 1901, *after Shappirio fully knew that the strip back of 1247 did not belong to him*—if he really ever did not know it—he wrote Goldberg: "I have fully made up my (not Mary's) mind not to rent 1245 & '47 any other way than I have been renting you heretofore as I think $50 *is very cheap* for the 2 buildings and should you make up your mind to move you will please give me 30 days' notice as per agreement" (R., p. 157). (See also R., pp 104, 105.)

The appellants conceded (R., p. 208) "that Shappirio is (September 11, 1901) *opening a place himself in 1245 and 1247;* that he was *unable to rent* the property, and there was *nothing* for him to do but *to try to put it to some use.*"

As a matter of law, it is submitted that the complainants have utterly failed to show any case either for the relief prayed or any other relief. Their rebuttal evidence in nowise helps them. The fatal testimony lies in their case in

chief. The conclusions from that case appear to me clearly to be in part as follows:

1. If complainants have any remedy at all, it is at law and not in equity.

2. The relief sought both by the bill and testimony upon the two theories of specific performance and rescission is absolutely inconsistent and cannot be granted.

3. Complainants themselves, as well as their agents Richold and the title company, had notice that no part of lot 2 was included in the sale, and the title company certainly knew that the land in the rear of 1247 was not included. The complainants knew in law whatever their agents knew in the course of their business.

4. The complainants' evidence shows conclusively that Goldberg *did not* make the representations charged in the bill nor any false representations whatever. The bill charges actual, active commission of fraud, but the evidence shows only mere silence.

5. The complainants, immediately upon learning of the alleged fraud, should have announced their intention to rescind, and adhered to it, but instead of doing so *they remained silent and continued to treat the property as their own*, and thereby they are held to have waived the objection and to be as conclusively bound by the contract as if the alleged mistake or fraud had not occurred.

6. The proof of the alleged false representations is not of the character or degree required for rescission of the executed contract involved in this case.

7. The complainants had full means of knowledge in the premises. They actually resorted to them. They placed no

reliance whatever upon the alleged false representations. They acted upon their own judgment and the information which they obtained from their agents and third persons.

8. There is no element of mistake charged in the bill, and certainly the proof does not tend to show any, but even if so *mutual* mistake would have to be both alleged and proved to aid complainants; yet the whole case is totally lacking in any *mutual* mistake.

9. The means of knowledge were at hand. They were equally available to both parties. The subject of purchase was fully open to inspection. It was, in fact, fully inspected by complainants. *Jacob even worked and lived in the property before the sale.* Respondents did and said nothing to prevent free action by complainants, and reasonable caution or vigilance would have fully given complainants the knowledge of the alleged want of which they now complain.

10. Goldberg's motive or design, if any he had, can be traced as equally to an honest as to a dishonest source, and so in law the honest motive or design must be preferred.

11. Complainants had ample time for inquiry, examination, and reflection. The contract gave 30 days (R., p. 12). They saw the property some time before the contract was signed.

12. Prayer C of the bill in and of itself is an affirmance of the sale.

13. The burden of proof is upon complainants to establish their case clearly.

14. The written contract cannot be extended by parol to include part of lot 2; nor can a parol contract to include

it be shown, by reason of the statute of frauds; nor can an express trust be shown by parol as to it, for the same reason.

15. There is no offer, either in the pleadings or proofs, to restore the land to respondents. This is absolutely necessary to any rescission in this case.

16. The complainants' equities do not preponderate in this case.

17. There can be no estoppel against the respondents in this suit, upon the complainants' own showing.

18. As complainants had the means of knowledge, and negligently remained ignorant, they are chargeable in law with actual knowledge.

Most of the cases and text-books cited in appellants' brief were read to the courts below. No fault is to be found with their enunciations of the law; but they do not apply to the pleadings or proofs in this case. Prayer C was eliminated from the bill by appellants in the primary court, and the case was heard there without it (R., pp. 199–200).

The primary court was of opinion that complainants' effort to prove a contract to sell part of lot 2 utterly failed; that fraudulent misrepresentations were another matter; that there was not a scrap of paper in the case to show that part of lot 2 was included; that the figures "80" in the paper of May 11, 1900, from respondents to Richold, was an afterthought, and was in different ink, handwriting, etc.; that the contract mentions part of lot 28, and so do the other papers, including the deed, deed of trust, etc.; that the mere fact that Shappirio was taken over the premises and gathered from what was said that the rear ground was included, in view of the papers, would not establish a contract

to sell part of lot 2; the claim that Goldberg led Shappirio to believe that the rear ground was included is denied by the respondents; concede that there was fraud; the contract was an executed one; Grymes *v.* Sanders, 93 U. S., 55, fully lays down the general principles applicable; the evidence of fraud must be clear; fraud or palpable mistake is necessary to rescind an executed contract; Southern Development Co. *v.* Silva, 125 U. S., 249, 250, states the essentials; complainants had *30 days* to close the sale; they made a $4,500 loan on a $6,000 purchase; the parties dealt at arm's-length; Goldberg did not seek out Shappirio, and did not interfere with the latter's investigation of the property; it is idle for Shappirio to say eight months afterwards that he was misled; Shappirio's acts of affirmance bind him; prayer C affirms the sale; it is the primary relief asked; it asks that the rear ground be added to what he got; and there is no offer in the bill or testimony to put Goldberg in *statu quo*. (From memorandum of oral opinion of Mr. Justice Bradley, preliminary to the final decree signed by him, R., pp. 199–200.)

The authorities hereinafter cited may be considered in connection with what I have hereinbefore set forth. I have endeavored to present the complainants' case as it appears to me, and to show that it is unnecessary to further wade through this record into the respondents' proof and the complainants' rebuttal testimony. I think that the case should end here and that the labors of the court and counsel should cease at this point. The Court of Appeals evidently took the same view of the matter, as will appear from its opinion (R., pp. 227–232).

Feeling quite confident that an extended consideration of the respondents' case will not be required in any event, I shall content myself with a brief synopsis of it and then close with a citation of authorities which, I believe, will cover every phase of the matter.

Roginski (Lewis A.) gave evidence (R., pp. 96–104) tend-

ing to show that the respondent, Minnie, had money of her own to buy part of lot 2; that she bought it from her own means; that she was in possession of it; that she caused the new fence to be erected; that he knew and saw Shappirio when the latter worked for Cohen and lived in 1247, etc.

Guy gave testimony tending to contradict certain testimony of Shappirio; to show offers to sell him this property made by Shappirio through his agent, Richold; to show that Goldberg had always been very honorable in his dealings, etc. (R., pp. 105–109).

Lewis (R., pp. 109–116) gave evidence tending to prove the purchase by Minnie from her own means of part of lot 2 and her sole and separate ownership of and estate therein.

Roginski (Isaac) also gave evidence tending to prove the same matters about which Lewis A. Roginski and Solomon Lewis testified, as above stated (R., pp. 117–147). He also testified: Richold wrote and read the authority of May 11, 1900 (R., p. 48). I heard him read it. While reading Goldberg stopped him, and told him that only *part* of the lot (28) runs back to the alley. Goldberg told Richold that he would find everything in his (Goldberg's) deed (the deed to Goldberg), and Richold said all right, and that the deed would show everything. Goldberg told Richold that he would find the width and depth in the deed. Goldberg did not say that the whole lot ran back to the alley; he said only *part* of the lot—*one part* of the lot—runs out to the alley. Not a word was said about the ownership of the ground or shed back of 1247. I never heard either Richold or Shappirio speak about it. I have known Shappirio since the first day he landed in Washington, about fifteen years ago. I have known Goldberg since 1872. Soon after the sale Richold came there and wanted to put up a for-sale sign. He said Shappirio was just speculating, and wanted to make $1,000 on the deal. I knew Shappirio when he clerked for Cohen (and lived in 1247). I never pointed out the rear ground as part of 1247, and never knew Goldberg

to do so. I helped to put up the new fence around part of lot 2. Minnie ordered and paid for it. The shed was and is used for storage purposes. I was present when Shappirio bought some shelving and stuff from Goldberg, *just before Goldberg moved out.* I heard the talk between them. Nothing was said about the ground or stable in the rear of 1247; nothing whatever; they never said a word about it. After Shappirio knew that he did not own the stable back of 1247 I talked with him about the property. He said he *bought it cheap enough.* I never said anything at all about the stables. I worked for Shappirio at one time for about a year in charge of 916 D street and 919 D street and 917 D street. I saw Richold and Shappirio in the Eleventh Street property before the sale. I heard Goldberg tell Richold that there was one part of the lot which would not run out to the alley, and in this way he told him that he did not own it; that he did not own the ground or stable back of 1247. Goldberg said to him that *part* of the lot runs back to the alley; that a part does not, and Richold replied that he would find everything in the deed. Goldberg said *part* of the lot runs to the alley and part does not belong to him. He pointed to the lot. After the sale Shappirio said to me, in the store 1217 Eleventh street, "*I have bought that property cheap enough without that stable. If it costs me $1,000.00 I will take that stable away from him.*" The areaway or passageway is paved with concrete. I visited Shappirio in 1247, when he worked there for Cohen. I used to go there on Sundays and play a little cards with Jake (Shappirio) and Cohen and a few more. We played upstairs in 1247. *There was no yard there at all,* but just a fence. In the summer time we played cards *between the building and the fence* (R., pp. 117–147).

Goldberg (George) gave evidence (R., pp. 201–213, 195–198) fully supporting the allegations of the answer in all respects.

Goldberg (Minnie) also gave evidence (R., pp. 214–224) to the same effect as her husband.

The testimony-in-chief of the respondents has been carefully digested and briefed, and will be found in the record in such concise form that it is considered unnecessary to refer to it at any length in this brief. It will only require a few moments to read and fully appreciate the whole of it, although it answers the whole of complainants' case.

Goldberg's (George) testimony in regard to the erection of the shed back of 1247 (R., pp. 195–198) clearly shows that he did not pay for its construction.

The complainants' proof in rebuttal (R., pp. 157–194) does not affect the case in any material respects whatever. It supplies no defects and removes no fatal evidence already in the case.

The respondents' documentary evidence (R., pp. 147–157) corroborates their answer and parol proofs.

It is submitted that the complainants' case on the facts is destroyed by the respondents' case on the facts. In any event, it seems clear that upon the law and facts combined the decree below was the inevitable result.

There are some rather unusual matters in the record. The proceedings recited in the final decree (R., pp. 199, 200); Richold's loose exclamations while testifying under oath, and Galloway's coarse remark to Ike, repeated by the former while testifying under oath (R., p. 176), may be mentioned.

The evidence of the complainants ran largely to an immaterial goat and a bull pup, which were really not the subject-matter of this suit according to the bill, however interesting and changeable in color they may have been in fact. Much light was also shed upon the history of these animals by the appellants' learned counsel in his critical cross-examination of the respondents and some of their witnesses.

This suit ought never to have been filed. If Shappirio honestly wanted the rear ground, which cost Minnie only $300, it seems more than strange that he made absolutely no effort whatever to acquire it amicably. He never had

any talk with Goldberg about the ownership of the stable. After he (Shappirio) saw the (new) fence there he went to see Goldberg about it, but he happened to be out. "Since then I did not go to him. *I went to consult a lawyer*" (R., p. 87). Even the lawyer did not attempt to get the strip out of court, but promptly filed this suit. The costs of this litigation so far make the purchase-money of the little strip of ground look very puny. *There would have been no difficulty whatever in the complainants' acquisition of the rear ground by mutual agreement out of court, upon an entirely reasonable basis, if they had wanted to acquire it in good faith.* The motive in this suit seems to be to harass the respondents and to put them to the utmost expense of winning the case, or else the complainants delight in litigation. If not, why have they caused an expense which, at the lowest estimate, up to the present time has cost the parties in money alone, apart from time, annoyance, etc., more than five times as much as was paid ($300) for the strip of land by Mrs. Minnie Goldberg to Darby? Shappirio seems to have made good his threat to Ike (R., p. 143) to spend $1,000 to take the stable away from Minnie—except that he has not succeeded.

Attention is respectfully invited to the following authorities, which seem to me to be applicable to the various phases of this case and to checkmate relief to the complainants, no matter what move or argument they may make:

REMEDY AT LAW.

Allegations and proofs of equitable grounds for relief are necessary to give jurisdiction to a court of equity. When the proof fails, the jurisdiction also fails.

Palmer *v.* Fleming, 1 App. D. C., 528.

Consent of parties cannot give equity jurisdiction of a case properly triable at law.

Palmer *v.* Fleming, 1 App. D. C., 528.

Where testimony has been taken as to a matter not in the pleadings, and there is no stipulation in regard to such matter, no decree should be made, but the parties should be left to pursue other remedies.

Offutt *v.* King, 1 MacAr., 312.

The objection that there is a complete remedy at law is jurisdictional, and may be raised by the court of its own motion.

Oelrichs *v.* Spain, 15 Wall., 211.

The court will entertain the objection at the hearing, and dismiss the bill; especially where the complainant's equity is denied, and a conflict of testimony leaves it doubtful if the complainant should have a decree.

Ford *v.* Smith, 1 MacAr., 592.

The rule that equity has no jurisdiction where there is a plain and adequate remedy at law must be closely adhered to in this District, in view of the constitutional provision for trial by jury in suits at common law.

Hess *v.* Horton, 2 App. D. C., 81.

It is not sufficient merely to allege that there is no remedy at law. That fact must appear from the facts stated in the bill.

Pechstein *v.* Smith, 14 App. D. C., 27; 27 W. L. R., 168.

If a bill in equity amount to a mere claim for damages for non-performance of a contract, it must be dismissed. The remedy is at law.

Townsend *v.* Vanderwerker, 20 D. C., 197.

Assumpsit may be maintained by a purchaser of land to recover back money or other consideration paid by him

where the vendor made *false and fraudulent representations* as to his title.

Main *v.* Aukam, 12 App. D. C., 375.

"The *damages* recoverable for * * * *false representations* include all damages, which, in the contemplation of the parties, or according to the natural or usual course of things, may result from the wrongful act."

Dushane *v.* Benedict, 120 U. S., 630.

INCONSISTENT RELIEF.

Complainant cannot attack an instrument as fraudulent and void, and at the same time claim rights under it if the court should be of the opinion that it is valid. He cannot blow hot and cold at the same time.

Lamon *v.* McKee, 18 D. C., 446.

Where a bill charges actual and intentional fraud, and prays for relief on that ground, the complainant cannot, under the prayer for general relief, rely on circumstances which may amount to a case for relief under a distinct head of equity, although those circumstances substantially appear in the bill, but are charged in aid of the actual fraud.

Clark *v.* Krause, 2 M., 559.

Where a bill charges fraud in fact, and complainant fails in his proof, he cannot be aided, under the prayer for general relief, upon a different theory.

Bailor *v.* Daly, 18 D. C., 175.

Party attacking a deed as fraudulent cannot, in the same suit, on failure of his proof to sustain the charge of fraud, shift his ground and claim upon the theory that the deed is operative.

Droop *v.* Ridenour, 11 App. D. C., 224.

Connolly *v.* Belt, 5 Cr. C. C., 405.

Under the prayer for general relief, the complainant can only claim relief of the same general nature as, and consistent with, that prayed in the bill. Relief cannot be claimed under different parts of the bill upon principles diametrically opposite.

Morrison *v.* Shuster, 1 M., 190.

Where the bill charges actual fraud, but the testimony shows that if any fraud existed it was constructive merely, the bill should be amended *before hearing*.

Murray *v.* Hilton, 8 App. D. C., 281.

See also—

Neale *v.* Neale, 9 Wall., 1.

NOTICE.

Notice to the *vendee's title examiner* is notice to the vendee.

Eldridge *v.* Life Ins. Co., 3 MacAr., 301.

Where the *record* discloses facts sufficient to put a purchaser upon inquiry, he cannot be considered an innocent purchaser without notice.

Beckett *v.* Tyler, 3 MacAr., 319.

Fraud in fact will never be presumed, but must be proved. All other things being equal, the motive and design of a representation will be attributed to *honest, rather than corrupt*, motives. A purchaser of a title under a slave marriage, having *notice* of doubts as to the validity of the marriage, cannot claim that he was induced to purchase by fraudulent representations as to the marriage.

Security Co. *v.* Garrett, 3 App. D. C., 69.

One who takes a deed upon the personal credit of the grantor, without examining the title or making inquiries as to the premises, cannot be held a purchaser without *notice*.

Waters *v.* Williamson, 21 D. C., 24.

Notice to an agent or attorney of the purchaser as to facts affecting the title is *notice to the purchaser, although the facts were not communicated to him*, and although the importance of the facts may not have been understood by the agent.

Security Co. *v.* Garrett, 3 App. D. C., 69.

One who buys without examination of title, or causes such examination to be made by reckless or incompetent persons, where a proper examination would show a defective title, cannot claim to be a purchaser in good faith without *notice*, as against the claims of the lawful owner.

Anderson *v.* Reid, 14 App. D. C., 54.

The acts and declarations of an *agent* of the vendor (or *vendee*), in the course of his employment, in relation to the title of land sold or exchanged, bind the vendor (or vendee).

Main *v.* Aukam, 12 App. D. C., 375.

"If, however, it be conceded that *notice* was an essential element * * * the principle would apply, that, *having the means of knowledge, and negligently remaining ignorant, is equivalent, in creating a liability, to actual knowledge.* This is the principle that was laid down in the House of Lords, upon great consideration, in the case of The Mersey Docks *v.* Gibbs, 11 Ho. L. Cas., 687, 701, and which has been quoted with approval by the Supreme Court, in the case to which we have already referred, of Bennett *v.* Railroad Company, *supra*," (102 U. S., 577, 582). Per Alvey, Ch. J., in Wash. Market Co. *v.* Clagett, 29 Wash. L. Rep., 807, 809 (Nov. 5, 1901), — App. D. C., —.

Knowledge of an agent that improvements were being made on property at the time he took a mortgage thereon for his principal, held to charge the mortgagee with *notice* of a mechanic's lien arising out of such improvements, which entitled the lien to priority under the Kentucky statute.

In re Wagner, U. S. D. C., E. D. Ky., 110 Fed Rep., 931.

Fraud will not be presumed as matter of law or fact except under circumstances which do not admit of any other interpretation.

Tucker *v.* Moreland, 10 Pet., 58.

A mere fraudulent intent, not consummated by any act, is no ground of action by the courts.

Clarke *v.* White, 12 Pet., 178.

Fraud is not to be presumed, nor can it be established except upon *clear* proof, either circumstantial or direct. If the form and design of a transaction assailed for fraud may be traced to an honest and legitimate source equally as to a corrupt and fraudulent one, the former should in all cases be preferred.

McDaniel *v.* Parish, 4 App. D. C., 213.

The proofs must be according to the allegations of the parties, and the proofs which go to matters not within the allegations the court cannot judicially act upon as a ground for its decision.

Harrison *v.* Nixon, 9 Pet., 483 (9–201).
Crocket *v.* Lee, 7 Wh., 522 (5–513).
Nash *v.* Towne, 5 Wall., 689 (18–527).

Fraud consists in intention, and that intention *must be averred in pleadings.*

Moss *v.* Riddle, 5 Cranch, 351 (3–123).
Voorhees *v.* Barnesteel, 16 Wall., 16 (21–268).

When bill charges *actual fraud* it cannot be sustained by proof of some of the facts, even though they may show constructive fraud.

Eyre *v.* Potter, 15 How., 42 (14–592).

Fraud is never presumed, but must be made out clearly.

Farrar *v.* Churchill, 135 U. S., 609 (34–246).

Schreyer *v.* Scott, 134 U. S., 405 (33–955).

Where the answer as well as answers to interrogatories are directly responsive to the allegations of the bill and deny the fraud the burden is on the plaintiff to establish the charge by evidence *aliunde.*

Eyre *v.* Potter, 15 How., 421 (14–592).

Simonton *v.* Vinter, 5 Pet., 141 (8–75).

Law presumes possession of vendee to have been *rightfully acquired,* and when it appears that a *sufficient consideration* was paid, vendee is entitled to verdict and judgment *unless it be shown affirmatively that he purchased in bad faith.*

Jones *v.* Simpson, 116 U. S., 609 (29–742).

Fraud is question of fact.

Warner *v.* Norton, 20 How., 448 (15–950).

McLaughlin *v.* Bk. of Potomac, 7 How., 220 (12–675).

That nominal value of property more than twice amount paid not itself indicative of *fraud.* See—

Davis *v.* Schwartz, 155 U. S., 631–647.

(39 L. Ed., 289.)

RESCISSION, EXECUTED CONTRACT, PROOF, ETC.

Where a party desires to rescind a contract upon the ground of mistake or *fraud* he *must,* upon the discovery of the facts, *at once* announce his purpose and *adhere* to it. *If he be silent and continue to treat the property as his own he will be held to have waived the objection and will be conclusively bound by the contract, as if the mistake or fraud had not occurred.*

McLean *v.* Clapp, 141 U. S., 429 (35–804).

Warner *v.* Godfrey, — U. S., —. 30 W. L. R., 502.

(S. C. U. S., June 2, 1902.)

If a party means to rescind a contract because of the failure of the other party to perform it he should give a clear notice of his intention to do so, unless the contract itself dispenses with such notice, or unless notice becomes unnecessary by reason of the conduct of the parties.

Hennessy *v.* Bacon, 137 U. S., 78 (34–605).

1. Misrepresentation must be relied on.
2. No rescission where party has means of knowledge, but does not resort to them.
3. Where parties deal "at arm's-length," and there is no fiduciary relation between them, *vendor may remain silent and be safe.*

Note: Book 40, p. 543 and cases cited (Co-op. Ed. Reps. S. C. U. S.).

Cancellation of an executed contract is an exertion of the most extraordinary power of equity, never exercised unless fraud or falsity of representation is clearly proved and complainant was deceived and injured by them.

Atlantic Delaine Co. *v.* James, 94 U. S., 207 (24–112).

When a contract for the sale of land is fully executed by a conveyance with a covenant of warranty and the payment of the purchase-money, the remedy for a defect of title is by an action on the covenant. A party declining to pursue that remedy and applying to the court of equity to rescind the entire contract must show very clearly that such a rescission is necessary to the ends of justice. If, therefore, on or before the final hearing the vendor makes and tenders a perfect title, no rescissions will be decreed, unless the vendee has suffered great loss or injury by the delay, and not then if such loss or injury can be fairly compensated by damages.

Kimball *v.* West, 15 Wall., 377 (21–95).

When in a court of equity it is proposed to *set aside, annul,* or correct *a written instrument* for *fraud* or mistake in the execution, the testimony on which this is done must be clear, unequivocal, and convincing, and not a mere preponderance of evidence which leaves the matter in doubt.

U. S. v. Maxwell Land Grant Co., 121 U. S., 325 (30–949).

U. S. *v.* San Jacinto Tin Co., 125 U. S., 273 (31–747).

U. S. *v.* Hancock, 133 U. S., 193 (33–601).

To justify the reformation of a written contract the evidence must be sufficiently cogent to satisfy thoroughly the mind of the court.

Simmons Creek Coal Co. *v.* Doran, 142 U. S., 43 (35–931).

A party seeking the rescission of a contract on the ground of *misrepresentations* must establish the same by *clear and irrefragable* evidence.

Farnsworth *v.* Duffner, 142 U. S., 43 (35–931).

Where relief can be granted only by setting aside a grant, a patent or other evidence of title issued by the Government, the evidence must be *clear, strong and satisfactory.*

U. S. *v.* Des Moines N. & R. Co., 142 U. S., 510 (35–1099).

Proofs which create only a suspicion do not bring the assurance of certain wrong.

United States *v.* Hancock, *supra.*

A bill to *cancel a deed* will be dismissed where the issue is entirely one of fact and the integrity of the transaction is not satisfactorily impeached.

Cissel *v.* Dutch, 125 U. S., 171 (31–642) (from D. C.).

Where all the *written* testimony tended to corroborate, rather than impeach, an agreement of settlement, and it was by *oral* evidence asserted by one and denied by another that any doubt arose, and where parties acted with deliberation *and after consultation, or opportunity to consult with* counsel, the court upheld the *written* agreement. The testimony should establish misrepresentations clearly and satisfactorily.

Chandler *v.* Pomeroy, 143 U. S., 318 (36–169).

Parol proof should never be made the foundation of a decree to reform a written contract so as to vary it, except it be of the clearest and most satisfactory character.

Snell *v.* Atlanta F. & M. Insurance Co., 98 U. S., 85 (25–52).

Howland *v.* Blake, 97 U. S., 624 (24–1027).

The evidence to impeach a deed or mortgage regular in appearance and bearing the genuine signature and duly certified acknowledgment of the grantor or mortgagor should be clear and convincing.

Northwestern Mutual Life Insurance Co. *v.* Nelson, 103 U. S., 544 (26–436).

It is too late to set up claim of fraud in procuring of agreement *after the party has carried the agreement into execution.*

Day *v.* Union India Rubber Co., 20 How., 216 (15–883).

An executed contract will not be declared void by a court of equity except upon the clearest evidence that it was without authority of law.

Noyes *v.* Coasting Co., MacAr. & Mackey, 1.

The facts and circumstances of the case, when taken together, must be strong enough to generate a *clear, rational conviction* of the existence of the *fraud charged.*

McDaniel *v.* Parish, 4 App. D. C., 213.

The reformation of a contract on the ground of mistake should not be decreed unless there is *clear proof* of *mutual* mistake, or mistake of one party induced by the fraud, deception, or wrong of the other party.

Clack *v.* Hadley, Tenn., 64 S. W. Rep., 403.

In order to reform a written contract a *mutual* mistake as to its form as actually signed is necessary.

Gough *v.* Williamson, N. J., 50 Atl. Rep., 323.

A contract cannot be reformed on the ground of *mistake* unless it is *clearly shown* that the *mistake was mutual.*

Fulton *v.* Colwell, U. S. C. C. (N. J.), 110 Fed. Rep., 54 (1901).

A contract of sale which has been executed with covenants for title will not be set aside as having been procured through false representations as to the non-existence of tax liens on the premises, except upon *clear* proof that it was founded upon such representations.

Harrington *v.* Ross, 15 W. L. R., 220.

After a contract for the sale of land has been executed by the delivery and acceptance of a deed, a bill will *not* lie, *in the absence of fraud,* to rescind the contract and have restitution of the purchase-money, on the ground of a defect in the title.

Smoot *v.* Coffin, 4 Mackey, 407.

Where a plaintiff exchanged his farm for a stock of goods, his conduct in selling from the stock held to preclude any rescission on the ground of fraud.

Moore *v.* Howe, Iowa, 87 N. W. Rep., 750.

Where there is no *mutual* mistake in the description in a deed of the property to be conveyed, and the parties intend to describe the land conveyed, a reformation thereof is not warranted on the ground of mistake.

Sherwood *v.* Johnson, Ind., 62 N. E. Rep., 645.

Where a purchaser of goods, after a fair opportunity of inspection, unconditionally accepts them, or deals with them as his own, he cannot repudiate such acceptance and refuse to pay.

Harper *v.* Baird, Del., 50 Atl. Rep., 326.

FALSE REPRESENTATIONS, PROOF, ETC.

False representation must be of an *existing and ascertainable fact*, not matter of opinion or advice, and *must be false and known to be false* by the party making it at the time.

Cooper *v.* Schlesinger, 111 U. S., 148 (28–382).

Misrepresentation, to vitiate contract of sale, must relate to material fact, constituting an *inducement* to the contract of which complaining party *had no means of knowledge, and upon which he relied*, and by which he was actually misled to his injury.

Slaughter *v.* Gerson, 13 Wall., 379 (20–627).

The neglect to make reasonable examination will preclude a purchaser from rescinding a contract of purchase on the ground of false and fraudulent representations. *He is also precluded when it appears that he did make such examination and relied on the evidence furnished by such examination, and not upon the representations.*

Farnsworth *v.* Duffner, 142 U. S., 43 (35–931).

In a suit in equity to set aside a contract and conveyances by which lands were exchanged, for false and fraudulent representations, where the evidence shows that in

making the exchange *no reliance was placed upon the representations, but that the party acted upon his own judgment and upon information obtained from third persons*, no ground is shown for maintaining the suit.

Shields *v.* Hanbury ("Hoyt *v.* Hanbury"), 128 U. S., 584 (32–565).

Where *means of knowledge are at hand and are equally available to both parties, and subject of purchase is open for inspection, if purchaser does not avail himself of these means*, he will not be heard to say, to impeach contract, *that he was deceived by vendor's misrepresentations.*

Slaughter *v.* Gerson, 13 Wall., 379 (20–627).

There must be a representation, express or implied, false within the knowledge of the party making it, *reasonably relied on by the other party*, and constituting a material inducement to his contract or act; if fact misrepresented not material inducement it will not vitiate, *or if not relied on, or reasonably relied on*, it will not vitiate.

"Such, for example, will be the case, if the party to whom the representation is made *resorts to the proper means of verification, so as to show that he in fact relied on his own inquiries; or if the means of investigation and verification are at hand, and his attention is drawn to them*, or if the representation regards a mere matter of opinion or inference with respect to which both parties have equal means of forming a judgment."

Adams Eq., *177, and cases.

False assertion of value, misstatement by buyer of motives in purchasing or in limiting amount of his offer, or vague and indefinite terms of commendation, will not vitiate. Representations must not only be false, but *known to be false.*

Adams Eq., *178, and cases.

Where both parties stand upon an equality of footing the fraud must consist of false representation of a material fact, and party to whom it is *made not be able by the exercise of reasonable caution and vigilance to detect its falsity.*

Finlayson *v.* Finlayson, 17 Or., 347; 3 L. R. A., 801.

Where both parties have *equal means of information, so that by the exercise of ordinary prudence and diligence either may rely upon his own judgment, misrepresentations, though false, will not be considered fraudulent.*

Adams Eq., *177.

The law raises no presumption of knowledge of falsity from the single fact *per se* that the representation was false.

Southern Development Co. *v.* Silva, 125 U. S., 247 (31–678).

Proceeds of sale can be followed only in cases of actual fraud clearly established. Actual fraud or fraud in fact can never be presumed, but must always be proved by the party who alleges it. If motive or design can be traced equally to *honest* and dishonest source, the *former* ought to be preferred.

"And though a representation made by a party sought to be charged was at the time untrue, yet, if the party was ignorant of it, and, so far as appears from the evidence, believed it was true, he is not responsible for the loss sustained by the other party in trusting to such representation."

Security Inv. Co. *v.* Garrett, 3 App. D. C., 69, 76.
McDaniel *v.* Parish, 4 App. D. C., 213.

As to cancellation of deed or contract in equity for *fraud*, concealment, or misrepresentation, see note to—

Nibbett *v.* McFarland, 23 L. Ed., 471.

If parties make contracts where there is no fraud, upon contingencies uncertain to both, with equal means of information, the courts cannot undertake to set them aside.

Gavinzel *v.* Crump, 22 Wall., 308 (22–783).

A contract signed because a party was in straitened circumstances, greatly embarrassed and in pressing want of money, where the other party to it is not responsible for his necessities, is a voluntary act, and he is bound by its terms. Where such a party signed a contract *after he had ample time for inquiry, examination, and reflection*, neither a court of equity nor a court of law can release him from its obligations.

French *v.* Shoemaker, 14 Wall., 314 (20–852).

A person alleging the fraudulent procurement of a contract *must allege* (and prove) that the false representations of the defendant gave rise to the contract, *and that the contract would not have been made but for such representations.*

Security Co. *v.* Garrett, 3 App. D. C., 69.

If one, after discovering the *fraud* or other invalidating circumstance, *delays, or continues to deal with the property as before*, he *affirms* the sale or other transaction; and, though he may afterwards discover other invalidating facts, he cannot disaffirm.

Clements *v.* Smith, 9 Gill., 160.
Howard *v.* Carpenter, 11 Md., 259.

See also—
Shields *v.* Barron, 17 How., 130.
Grymes *v.* Sanders, 93 U. S. (3 Otto), 55.

A vendee of real estate held not entitled to a rescission on the ground of misrepresentations where the facts relative to which the representations were made *were obvious.*

Trammell *v.* Ashworth, Va., 39 S. E. Rep., 593.

Where a vendee of a house and lot occupied the same *for a considerable time without claiming misrepresentations on the*

part of the vendor, held that she was not entitled to a rescission because of misrepresentations.

Trammell *v.* Ashworth, Va., 39 S. E. Rep., 593.

Where the vendor gave the vendee every opportunity he possessed to inform himself of the *location, condition and title* to the lands under negotiation, and requested him to call on the *proper persons and officers* to ascertain the facts regarding the lands, the vendee cannot have relief on the ground of misrepresentations as to the title.

Sanders *v.* Lyon, 2 MacAr., 452.

In the absence of any allegation of fraud or mistake in a *written* contract for the sale of the interests of two of a large number of heirs in a tract of land, the purchaser cannot avoid payment on the ground that the vendors falsely represented that they had title as heirs to certain lands, to which they in fact had no title.

Begley *v.* Eversole, Ky., 64 S. W. Rep., 513.

"The burden of proof is on the complainant, and unless he brings evidence sufficient to overcome the natural presumption of fair dealing and honesty, a court of equity will not be justified in setting aside a contract on the ground of fraudulent representations. In order to establish a charge of this character the complainant must show by clear and decisive proof: First, that the defendant *has made* a representation in regard to a material fact. Secondly, that such representation is false. Thirdly, that such representation was *actually believed* by the complainant *on reasonable grounds*, to be true. Fourthly, that it was made with intent that it should be acted on. Fifthly, that it *was* acted on by complainant to his damage; and, sixthly, that in so *acting on it* the complainant was ignorant of its falsity and *reasonably believed* it to be true."

Per Lamar, J., in Southern Development Co. *v.* Silva, 125 U. S., 249, 250.

One who contracts for the purchase of real estate in reliance on the representations of the vendor, but *after* he has

had the means of verifying such statements, cannot avoid the contract on the ground that they were false.

Brown *v.* Smith, U. S. C. C., 109 Fed. Rep., 26.

"The rule of *caveat emptor* is one of the most valuable of our common-law inheritances, and should not be twisted out of its old-time effectiveness by reason of its working apparent injustice in hard cases. Any modification of its ancient sternness would be a calamity, tending not only to increase litigation but to make weaklings out of the people and encourage them to rely more on the strong arm of the court than upon their own common sense and judgment. Entertaining such views we, of course, are inclined to commend most emphatically the decision of the court in the recent case of Brown *v.* Smith, 109 Fed. Rep., 26, where it was held that one who contracts for the purchase of real estate in reliance on the representations and statements of the vendor as to its character and value, but after he has visited and examined it for himself, and has had the means and opportunity of verifying such statements, cannot avoid the contract on the ground that they were false or exaggerated. The court expresses itself in this language: 'Reviewing and considering the testimony, it is manifest that the defendant entered into this contract *assuming* many things to be true without proper examination, and without using the means of verification at hand. There was no sort of fiduciary relation between him and the plaintiff. They were mere acquaintances, and in their dealings were both on guard, or should have been. He is evidently a gentleman of culture, of intelligence, and experienced in affairs. He is not a ward of the court, nor entitled to its special protection.'"

53 Central Law Journal, 282 (Oct., 1901).

STATUTE OF FRAUDS.

The mere refusal of a party to perform a parol contract for the sale of lands is not such a fraud as will give a court of equity jurisdiction to interfere to enforce it.

Dunphy *v.* Ryan, 116 U. S., 491 (29–703).

Where an agreement concerns land and is in parol it is void by the statute of frauds. If it so appears on the face

of the bill, such defense may be taken advantage of on demurrer.

Randall *v.* Howard, 2 Bl., 585 (17–269).

A parol agreement, creating by parol a trust or interest in lands, cannot be sustained under the statute of frauds.

Howland *v.* Blake, 97 U. S., 624 (24–1027).

The statute which requires a contract for land to be in writing is equally binding on courts of equity and courts of law. Courts of equity in some cases have relaxed the rules, but only for the purpose of preventing the use of the statute for fraud.

Purcell *v.* Coleman ("Purcell *v.* Minor"), 4 Wall., 513 (18–435).

A written contract within the statute of frauds cannot be varied by any subsequent agreement of the parties, unless such new agreement is also in writing.

Swan *v.* Seamens, 9 Wall., 259 (19–554).

Onus probandi lies on party asserting existence of trust.

Prevost *v.* Gratz, 6 Wheat., 481 (5–311).

Unless the transactions to which the charges of fraud or a breach of trust refer are such as in their *essential* nature constitute a *fraud* or breach of trust, a court of chancery cannot grant relief.

Van Weel *v.* Winston, 115 U. S., 228 (29–384).

The court will not be astute to charge a trust on one who has acted honestly.

Wilson *v.* Wall., 6 Wall., 83 (18–727).

WRITTEN CONTRACTS, CONSTRUCTION, PAROL EVIDENCE.

Written Contracts, Construction of.

Courts will not assume to make a contract for the parties which they did not choose to make for themselves.

Morgan County *v.* Allen, 103 U. S., 515 (26–583).

Courts cannot incorporate into a sealed instrument any covenant for the expression of which language is entirely wanting in the instrument, and which cannot be legally implied from any other covenant therein, although the contract, as expressed, may seem much in favor of one party, and the omission of a covenant was clearly occasioned by mistake.

Delaware & H. Canal Co. *v.* Pennsylvania Coal Co., 8 Wall., 276 (19–349).

Gavinsel *v.* Crump, 22 Wall., 308 (22–783).

Robbins *v.* Clarks ("Robbins *v.* Rollins"), 127 U. S., 622 (32–292).

Where the meaning of the contract is clear the error of the parties cannot control its effect.

Philadelphia, W. & B. R. R. Co. *v.* Trimble, 10 Wall., 367 (19–948).

Written Instruments, Parol Testimony.

Both at law and in equity parol testimony is inadmissible to vary a written instrument.

Forsythe *v.* Kimball, 91 U. S., 291 (23–352).

Richardson *v.* Hardwick, 106 U. S., 252 (27–145).

Baltzer *v.* Raleigh R. R. Co., 115 U. S., 634 (29–505).

Parol evidence to show how all the parties understood the transaction from its commencement to its final consummation is inadmissible to explain and qualify what is in writing.

Bailey *v.* Hannibal & St. J. R. R. Co., 17 Wall., 96 (21–611).

So is evidence of prior declarations or conduct.

Baker *v.* Nachtrieb, 19 How., 126 (15–528).

When parties have put their engagements into writing, in such terms as import a legal obligation without any uncertainty, it is *conclusively* presumed that the *whole engagement* was reduced to *writing*, and all oral testimony of a previous conversation between the parties is inadmissible.

De Witt *v.* Berry, 134 U. S., 309 (33–896).

Seitz *v.* Brewers' Refrigerating Machine Co., 141 U. S., 510 (35–837).

A party who gives in evidence a written agreement cannot give testimony of contemporaneous oral agreements to vary the written agreement where he does not seek to prove any additional agreement or any consideration for the same.

Culver *v.* Wilkinson, 145 U. S., 205 (36–676).

Johnson *v.* St. Louis, etc., R. R. Co., 141 U. S., 602 (35–875).

Gilbert *v.* Moline Plow Co., 119 U. S., 491 (30–476).

Where written contract contains no guaranty, parol evidence of one is inadmissible.

Van Winkle *v.* Crowell, 146 U. S., 42 (36–880).

Although a party to a contract had objections to it, yet, having executed it, his mouth is closed against any denial that it superseded all previous arrangements.

Parish *v.* United States, 8 Wall., 489 (19–472).

Oral agreements between the parties to a written contract, made before or at the time of the execution of the contract, are merged in the contract, and are inadmissible to vary its terms or to effect its construction.

Emerson *v.* Slater, 22 How., 28 (16–360).

Oebucks *v.* Ford, 23 How., 49 (16–534).

Union Mutual Insurance Co. *v.* Mowry, 96 U. S., 544 (27–674).

A verbal agreement between the parties to a deed made at the time of the delivery, or previous thereto, that one of them should be released from the covenants contained in the deed, cannot defeat an action for the alleged breach of those covenants.

Wadsworth *v.* Warren, 12 Wall., 307 (20–402).

A parol agreement of insurers made on receiving a promissory note, in direct contradiction to the express terms of the policy, and the note itself cannot affect them, but is itself void.

Thompson *v.* Knickerbocker Life Insurance Co., 104 U. S., 252 (26–765).

Where a contract of sale is clearly expressed in writing the printed bill-head of the invoice of the goods cannot control, modify or alter it.

Sturm *v.* Boker, 150 U. S., 312 (37–1093).

Parol evidence is not admissible to supply an omission of an important provision from a deed, *whether intentional* or through a mistake of law *or from carelessness*, in the absence of fraud on the part of the grantor.

McCartney *v.* Fletcher, 11 App. D. C., 1.

Parol evidence is not admissible to show that it was intended that grantees should take as tenants in common, and not as joint tenants.

Seitz *v.* Seitz, 11 App. D. C., 358.

See also—

Potomac *v.* Upper, 109 U. S., 672.
Spofford *v.* Brown, 1 MacAr., 223.
Linville *v.* Holden, 2 MacAr., 329.
Burr *v.* Meyers, 2 MacAr., 524.
Langdon *v.* Evans, 3 Mackey, 1.

"In each case the burden rests upon the moving party of overcoming the *strong presumption* arising from the terms of a written instrument. If the proofs are doubtful and unsatisfactory, if there is a failure to overcome this presumption by testimony entirely plain and convincing *beyond reasonable controversy*, the writing will be held to express correctly the intention of the parties. A judgment of the court, a deliberate deed or writing, are of too much solemnity to be brushed away by loose and inconclusive evidence."

Per Hunt, J., in Howland *v.* Blake, 97 U. S., 624–626.

See also—

Snell *v.* Ins. Co., 98 U. S., 85.
U. S. *v.* Maxwell, 121 U. S., 325.
U. S. *v.* San Jacinto, 125 U. S., 273.
U. S. *v.* Hancock, 133 U. S., 193.
Simmons *v.* Doran, 142 U. S., 417.
Osborne *v.* Mortgage Co., 8 App. D. C., 481.

RESTORING CONSIDERATION.

The remedy which the court affords on a void transaction is the replacement of the parties in *statu quo* (Adams Eq., *191).

The beneficiary of a life-insurance certificate who settles for less than its face value cannot *rescind* the settlement for *fraud* and maintain an action on the claim, without first repaying the money received.

Moore *v.* Mass. Ben. Ass'c'n, 43 N. E. Rep., 298 (Mass.).

That consideration received must be returned or offered to be returned before deed will be set aside, see—

Cunningham *v.* Macon & B. R. R. Co., 156 U. S., 400, 425 (39–471, 478).

Citing—

Collins *v.* Riggs, 81 U. S., 14 Wall., 492 (20–723).
Jones Mortgages, sec. 1669.
Pom. Equity, secs. 1220 *et seq.*

Insolvency of purchaser, who knew that debts exceeded assets when first or any subsequent bills of goods were purchased, would not of itself justify the setting aside of the sale after the goods had come fully and fairly into his possession. To avoid such a sale after buyer has taken possession there must have been some trick or artifice or false pretense or suppression of truth which enabled him to get possession, *and* it must appear that he *then* intended not to pay for the goods, *and full restoration of whatever of value was received must have been made by the seller.*

Thompson *v.* Peck, 115 Ind., 512.
1 L. R. A., 201.

Mere failure to pay purchase-money according to terms of contract will not entitle vendor to have contract rescinded. Where vendee has paid part of purchase-money, and has given notes for balance, before vendor can rescind he *must return*, or *offer to return*, the money paid *with legal interest*, less reasonable rental value of premises, if vendee has been in possession, and also all unpaid notes.

Frank *v.* Thomas, 20 Or., 265; 12 L. R. A., 239.

So also if contract be rescinded for fraud at suit of vendee.

Tarkington *v.* Purvis, 128 Ind., 182; 9 L. R. A., 607.

"The jurisdiction (of equity) for rescission and cancellation arises where a transaction is vitiated by illegality or fraud, or by reason of its having been carried on in ignorance or mistake of facts material to its operation. And it is exercised for a double purpose, first, for cancelling *executory* contracts * * * and, secondly, for setting aside *executed* conveyances * * * where it is necessary to replace the parties in *statu quo*. The * * * relief * * * may be by * * * reconveyance of the property which has been unduly obtained."

Adams Equity, *174, and numerous cases cited in note 3.

The court will not rescind unless it can put the parties in *statu quo*. *Id.*, note 3, *infra*, and cases cited.

In cases of usury courts of equity will give no relief to the borrower if the contract be executory, except on condition that he pay the money loaned, with legal interest.

Tiffany *v.* Boatman's Saving Institution, 18 Wall., 375 (21–878).

Where a bank received a mortgage as security in exchange for certain other securities from a debtor, it *cannot vacate* the *agreement* for such exchange upon any *allegation of imposition or fraud, without surrendering the mortgage.*

Farmers' Bank of Virginia *v.* Graves, 12 How., 51 (13–889).

He who seeks equity must do equity, and cannot set aside the proceedings for collection of a debt without tendering the amount due.

McQuiddy *v.* Ware, 20 Wall., 14 (22–311).

COMPLAINANTS' EQUITIES MUST PREPONDERATE.

If equity does not preponderate in favor of the complainants they must fail.

Garnett *v.* Jenkins, 8 Pet., 75 (8–871).

A mere preponderance of evidence which is at the same time vague or ambiguous is not sufficient to warrant a finding of fraud.

Lalone *v.* U. S., 164 U. S., 255.

NO ESTOPPEL.

"Where the condition of the title is known to both parties, or both have the same means of ascertaining the truth, there can be no estoppel."

Brant *v.* Virginia Coal Co., 93 U. S., 326, 327 (23–927, 929).

Cited with approval in—

Mutual *v.* Phinney, 178 U. S., 343.

It is respectfully submitted that:

1. The decree should be affirmed upon the complainants' own showing.

2. The decree should be affirmed at all events upon the entire record.

THOMAS M. FIELDS,
Solicitor for Appellees.

WASHINGTON, *December*, 1903.